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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 190

MERLIN M. ARMSTRONG, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I

RESPONDENT CREATES A FALSE ISSUE

The respondent has sugar-coated its version of the question. The choice of words used is such as to indicate petitioners were given normal time for sleeping and eating without restriction or condition.

Such a conclusion is demonstrably false on the basis of the findings of the court below:

> ". . . The base was in continuous activity day and night.
>
> "The 24-hour daily operational schedule could not be arranged to suit the convenience of the fire-

fighter plaintiffs or to permit them to sleep at their pleasure. Thus it was necessary for all firefighters to be available for duty all hours of the night, or the function of the base would not be adequately performed. Plaintiffs were subject to call throughout the night hours for the same type of work as through the day hours . . . (F. 11)[1]

"Night hours of duty were similar in many respects to daytime duty and were characterized by the following . . . (F. 11)

(Activities listed; see also F. 10)

". . . there were nights when there would be a succession of calls for long periods or several short periods . . .

"The general nature and activity of the air base operations over the period of a 24-hour day is such that there is no distinction from hour to hour and no distinction between any hour insofar as plaintiffs' responsibilities for responding to all calls and demands is concerned. (F. 14)

"When plaintiffs were employed, it was understood that there would be no distinction between the hours of the day and night, and no specific time was set aside for the carrying on of any personal activity, such as sleeping or eating. Plaintiffs responded to any and all calls occurring at night in the same manner as during the daytime . . ." (F. 16)

There was no Department of the Air Force Regulation or Base Regulation prescribing hours to be set aside for sleep.

The real question is, "Can the Federal Government keep employees on the job overnight—8 hours—without pay or any consideration whatever when their

[1] "F" references are to the findings of the Court of Claims.

presence and service is required for the benefit of the Government?"

The respondent, in its reply, has ignored the question as to whether petitioners are entitled to recovery for hours of actual work performed and the interruptions during the eating and night hours for which they were not paid.

The respondent has furthermore completely ignored the question as to whether petitioners are entitled to full night differential pay for all hours of duty between 6 p.m. and 6 a.m.

II

RESPONDENT'S STATEMENT OF FACTS IS IN ERROR

The respondent, in summarizing some of the facts found by the Court of Claims, states that petitioners were compensated for *firefighting duties* pursuant to the so-called two-third's rule. This is inaccurate for they were not compensated for *any* actual duties performed during 8 hours of each tour of duty.

This is precisely the issue raised in petitioners' question number two, which respondent has overlooked:

> ". . . are plaintiffs nevertheless entitled to recover for hours of actual work performed and the interruptions during their so-called eating hours and night hours?"

Respondent errs again in stating that one-third of a tour is set aside for eating and sleeping and that the remaining two-thirds are divided equally between active worktime and inactive standby period. Finding 16 of the Court of Claims specifically negates this:

> "When plaintiffs were employed, it was understood that there would be no distinction between

the hours of the day and night, and no specific time was set aside for the carrying on of any personal activities, such as sleeping or eating . . ."

Neither was there any Department of the Air Force Regulation or Base Regulation prescribing hours to be set aside for sleep as required by the United States Civil Service Commission if the so-called two-third's rule were to be followed (Federal Personnel Manual Z-1, Section 25.211 (c)).

The headquarters office instruction governing petitioners' hours of duty provided "the tour of duty of firefighters will consist of 24 hours on duty, and 24 hours off duty". (F. 16)

It is true, as respondent has stated, although quite paradoxical, that the Government felt the time of petitioners spent in dominoe playing was fully compensable, while denying compensation for hours they were forced to remain in the fire station away from their families at night.

Respondent indicates that the petitioners only had to remain at the base, whereas the true fact is, they were restricted to the narrow confines of the fire stations without permission to have visitors or to take their meals in the base cafeteria.

Respondent states petitioners were permitted to sleep certain hours and allowed time for eating. This oversimplifies the facts as they were only allowed at certain times to sleep or eat if there were no work calls to be performed.

Findings 10 and 12 of the Court of Claims list many duties that had to be carried on during the night hours and eating hours, and Finding 11 makes note of the

night watch which was required of each petitioner. This finding also refers to the fact that, "the 24-hour daily operational schedule could not be arranged to suit the convenience of the firefighter plaintiffs or to permit them to sleep at their pleasure."

The Court below finds further:

> "Thus it was necessary for all firefighters to be available for duty all hours of the night, or the function of base would not be adequately performed," (F. 11).

III

REPLY TO RESPONDENT'S ARGUMENT

A. Respondent Refuses to Recognize the Lack of Conflict Among Prior Cases Where Certiorari Was Denied

In considering petitions for certiorari, it is the aim of this Court to arbitrate the conflicts among the lower courts and to determine questions of importance. Respondent cites a number of cases wherein petitions for writs of certiorari have been denied. But these cases do not raise the issue of conflicting decisions.

General Electric Company v. *Porter*, 208 F. 2d, 805 (9th Cir. 1954) and *Glen L. Martin Nebraska Co.* v. *Calkin*, 197 F. 2d 981 (8th Cir. 1952), cited by respondent hold that the plaintiffs are entitled to full compensation for the period claimed.

> "Considering the nature of the service performed by the firemen, we conclude that the firemen were engaged to wait; that their compensation covered both waiting and task, and that the living quarters were furnished as a facility of the task." *General Electric Company*, v. *Porter*, *supra*, at page 815.

> "But the question was not so much whether the guards and firemen were actually regularly called upon to put down overt acts of violence, sabotage, disturbances, or to put out fires during the 30-minute period, *as it was whether they were performing their regular duties during that period and were then substantially performing the duties assigned to them by their employer and were not free to follow pursuits of a purely private nature.*" (Emphasis supplied) *Glen L. Martin Nebraska Co.* v. *Culkin, supra,* at page 984.

Thus, the courts followed the decision of this Court in *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944).

Respondent, in citing *Bell* v. *Porter*, 159 F. 2d 117 (7th Cir. 1947) and *Rokey* v. *Day & Zimmerman*, 157 F. 2d 734 (8th Cir. 1946) failed to note that in these cases the courts specifically found that there were express agreements or contracts between the employees and the employers exempting the time in question from being working time. The courts based their decisions on these agreements.

Respondent further cites *Sawyer* v. *United States*, 138 C.Cls. 152[1] which denied any recovery for night hours of duty, "on the authority of our opinion in the *Gaetke* case . . ." In *Gaetke* v. *United States*, 136 C.Cls. 756, 145 F. Supp. 913 (1956), the Court found again that there was a specific written agreement with respect to the hours in contention and said, "The contract between the employees and the railroad was a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs."

Thus, we have a division in the decisions which can readily be reconciled on the basis of the existence or

[1] See Petition page 19 footnote 1.

absence of a controlling agreement. There was no conflict, and the petitions were therefore denied.

Respondents have cited *Conn* v. *United States*, 107 C.Cls. 422, 68 F. Supp. 966 (1944), but in that case there is no conflict, because it was decided under an entirely different statute which specifically provided premium pay for overnight work and the court found plaintiffs were properly paid for their night work under that premium pay proviso. Such a provision is not included in the statute applicable to the case at bar.

Respondent cites this Court's decision in *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944), quoting, "Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case." But that question was not answered nor even applied by the court below in the case at bar. Its decision was based upon a preconceived notion that nighttime and eating time are not compensable and that only actual physical labor should be paid.

Respondent again refers to the decision in *Armour* wherein this Court discussed with approval the manner in which the Administrator of the Wage and Hour Division had resolved the problem administratively *at that time*. But Respondent completely ignores the fact that *the Administrator has now reversed his position* as set forth in the current and applicable Interpretative Bulletin which provides in Footnote 22 to Section 785.3 d:

> "Where no expressed or implied agreement to the contrary is present the 8 hours of sleeping time and lunch periods constitute hours worked."

With respect to eating time, the current bulletin provides:

> "The employee must be completely relieved from duty for the purpose of eating regular meals or the mealtime will be considered working time.
>
> "The employee is not relieved if he is required to perform any duties whether active or inactive while eating, for example, the office employee who is required to eat at his desk . . ." (785.3 d)

It will also be noted from an examination of the opinion in *Rokey* v. *Day & Zimmerman*, 157 F. 2d 734 (8th Cir. 1946), cited by respondent, that there was introduced in evidence as an exhibit a letter from the Deputy Wage and Hour Division Administrator, approving the hours of work proposed providing,

> ". . . that employees will be paid for any time during those 8 hours that they may be required for fire calls or fire-fighting purposes, and *provided that the arrangement is mutually satisfactory to the employer and the employees.*" (Emphasis supplied)

In that case the plaintiffs approved the plan.

The Wage and Hour Division clearly feels it essential to have an agreement authorizing deduction of night and eating hours from working time specifically approved if the time is to be deducted and, further, that work performed during such time shall be compensated.

We feel this Court will be moved to accord similar respect to the applicable version of the Wage and Hour Division policy which reverses the old policy quoted by respondent.

We cannot understand how one department of the Executive Branch—the Department of the Air Force, represented by the Department of Justice—can consistently ignore the rulings and policies of another branch—the Department of Labor—in a field in which it is the so-called authority. But the fact remains, this is just what has happened.

Furthermore, respondent is inaccurate in saying that petitioners were fully compensated by being paid for the time actually worked. They were not paid for any time worked during 8 hours of each day which were incorrectly characterized as eating and sleeping time. The record shows that they did work during this period and petitioners' question number two is specifically directed to this point.

The Wage and Hour Division, as quoted above, provides that they should be paid for such work.

The respondent again uses misleading language in footnote 5, page 9 wherein it is stated that the Senate Committee on Post Office and Civil Service has the same understanding with respect to the Federal Employees Pay Act as the Wage and Hour Division formerly did with respect to the Fair Labor Standards Act. This is incorrect. The portion of the Committee Report quoted by respondent has to do with an amendment to the 1954 Federal Employees Pay Act, *not* the 1945 Act applicable in this case. The 1954 Act provided premium payments for firefighters in lieu of the overtime provided in the 1945 Act herein applicable. The amendment being discussed provides payment of time-and-a-half *in addition* to the premium pay for all hours worked over the scheduled tour of duty, i.e., over 24 hours. Of course the Committee understood

that no overtime was to be paid for any hour *in the tour of duty* whether for work, standby, eating or sleeping because the firefighters received premium pay. Thus it was entirely proper for the record to show that since the firefighters were compensated for mealtimes and nighttimes on the job by the premium pay provision, they should not receive additional overtime compensation.

Respondent next claims that to allow recovery to petitioners would be novel and contrary to the consistent practice under the Fair Labor Standards Act and applicable Federal pay statutes. To refute that statement, we need only to cite *Farley* v. *United States, supra*, and *England* v. *United States, supra*, decided by the court below, wherein full recovery was allowed for sleeping and eating time. In other courts full recovery has also been ordered. *General Electric Co.* v. *Porter, supra*, and *Glen L. Martin Nebraska Co.* v. *Culkin, supra*.

The principle is as old as *M.K. & T. Railway* v. *United States*, 231 U.S. 112 (1913). Also cf. *Chicago, Rock Island & Pac. Rwy. Co.* v. *United States*, 253 Fed. 555 (8th Cir. 1918) and the *current policy* of the Wage and Hour Division as mentioned above.

The principle of compensating employees for time given to the employer for the employer's benefit is not novel or inconsistent.

B. Respondent Misconstrues the Opinions of the Various Circuit Courts of Appeals in an Attempt to Find a Lack of Conflict With the Present Case

Respondent's argument attempts to differentiate the factual situations in certain cases cited by petitioners in order to show there is no conflict between those de-

cisions and the decision in the case at bar. We shall analyze the arguments case by case.

In *Central Missouri Telephone Co. v. Connell*, 170 F. 2d 641 (8th Cir. 1948), we prefer to look to the exact wording of the court's opinion than to the paraphrasing of respondent. In that opinion, on page 646, it is stated:

> "The number of calls through each of the exchanges varied greatly. The load, as it is called in the record, usually decreased considerably by eleven o'clock or midnight, and thereafter calls were infrequent. . . . Some nights the operators were able to get several hours of uninterrupted sleep, while other nights they were disturbed at frequent intervals and obtained very little sleep. In any event they were required to be in the exchange ready to serve . . . They were not there for the purpose of sleep nor for any purpose of their own, but for their employer's benefit."

Thus we find a factual situation squaring with Finding 14 of the court below in the case at bar:

> "The nighttime calls were for periods of varied duration, lasting from a few minutes to several hours, and there were some rare occasions when plaintiffs would be up and engaged on calls throughout the night hours. There were nights when there would be a succession of calls for long periods, or several short periods. During some nights there would be no calls, and on a few occasions there would be continuous all-night activity."

And in Finding 11:

> ". . . Thus it was necessary for all firefighters to be available for duty all hours of the night, or the function of the base would not be adequately performed."

This Court, in *Armour & Co.* v. *Wantock*, *supra*, laid down the test— Is the time spent predominantly for the employer's benefit or for the employee's?

In the *Central Missouri Telephone Co.* case, *supra*, the court applied that test and permitted a full recovery. In the case at bar the court below ignored that test.

Let us refer to the second case cited by respondent, *F. W. Stock & Sons* v. *Thompson*, 194 F. 2d 493 (6th Cir. 1952). In that case, on page 496, the court adopted the conclusion of the District Judge that the lunch period of employees working in a mill should be compensable and said, at pages 496-7:

> "Time spent predominantly for the employer's benefit during a period, although designated as a lunch period or under any other designation, nevertheless constitutes working time compensable under the provisions of the Fair Labor Standards Act."

In the case at bar that test was not applied.

In *General Electric Co.* v. *Porter*, *supra*, wherein full recovery was ordered, respondent seeks to distinguish a case involving firefighters on the ground that the court took into account that the firefighters had to protect not only the employer's plant area, but two populous communities as well, thus greatly increasing the probability of an alarm at night. Respondent has apparently overlooked Finding 10 of the Court below.

> "Among the specific activities of plaintiffs' 24-hour day were the following;
>
> * * *.
>
> "(e) fire calls to nearby cities in accordance with agreement with organized fire departments;

Midwest City, population 24,000; Dell City, population 7,000; Oklahoma City,"

On this point, as on others, the two cases are almost identical on the basis of facts.

In *Glen L. Martin Nebraska Co.* v. *Culkin, supra,* firefighters were required to be on call during a 30-minute lunch which they were allowed to eat in the cafeteria. The time for which compensation is claimed is this 30-minute period. The defendant contended that the firefighters were required to answer calls during the lunch period in comparatively few instances. However, the court said, at page 984:

> "But the question was not so much whether the guards and firemen were actually regularly called upon to put down overt acts of violence, sabotage, disturbances, or to put out fires during the 30-minute period, as it was whether they were performing their regular duties during that period and were then substantially performing the duties assigned to them by their employer and were not free to follow pursuits of a purely private nature . . .
>
> ". . . the firemen were likewise obligated to be constantly vigilant to prevent fires, yet both the guards and the firemen served to a considerable extent in a stand-by capacity. In the latter respect both were engaged in their regular duties during the 30-minute period as effectively as if they were putting down disturbances or putting out fires."

In the case at bar, the mealtimes of petitioners were even further restricted in that they were required to remain at their post of duty and were not free to go to the cafeteria. Unless they had been on the job, "the

function of the base would not be adequately performed." (F. 11)

In the *Glen L. Martin Nebraska Co.* case, *supra*, the court followed the test laid down by this Court in determining whether the service was primarily for the benefit of the employer. In the case at bar the test followed by the Court of Claims was whether the plaintiffs performed substantial physical labor. It ignored the test of benefit and the fact that these petitioners were engaged to wait.

C. By Ignoring the Conflict of the Present Case With Prior Decisions in the Court of Claims Respondent Tacitly Recognizes It

Respondent states the Court of Claims has consistently followed the rule that under the Federal Employees Pay Act of 1945, an employee is to be compensated only for substantial periods of actual labor during meal and nighttimes. This is patently erroneous and for proof one has only to refer to the cases of *Farley* v. *United States, supra*, and *England* v. *United States, supra*, wherein full compensation for all sleeping and eating hours was ordered for the reason that "plaintiff's freedom of choice to follow her own habits was restricted for the benefit of the defendant . . ." There was no record of substantial labor before the Court. On the contrary, the record shows infrequent interruptions which are unsupported by log records or any evidence other than plaintiff's own testimony.

It is significant that respondent does not attempt to distinguish the facts and set forth the differences in *Farley* and *England* despite its claim. If respondent had done so, it would have discovered no difference and that it had clearly misstated the court's decisions in those cases.

In this respect respondent has fallen into the same error that the Court of Claims has committed in its opinion in the present case. The court below stated on page 4 of that opinion that "compensation was allowed because substantial labor was performed during the times set apart for sleeping and eating." We respectfully note that the court below in its opinion in *Farley* stated, "The issue remains still the single one of whether the plaintiff was on duty in excess of 40 hours per week." The court below in *Farley* found plaintiff was on duty because the order covering her hours so stated, the same as in the case at bar, and because her freedom of choice to follow her own habits was restricted *for the benefit of the defendant.*

In *Farley* the court below thus correctly applied the test set out in *Armour & Co.* v. *Wantock, supra.*

It is noteworthy that the court below in denying recovery did not cite or attempt to distinguish or reconcile its holding with either the facts *or the law* in the opinions of the Eighth and Ninth Circuits which have allowed full recovery for nighttime duty. Rather, the court stated that the decisions of the Seventh Circuit only, and of the Court of Claims provided authority for its holding. It did not distinguish Court of Claims cases denying recovery from the *Farley* and *England* cases (where recovery was allowed) and the present case which is substantially identical with *Farley* and *England.* It found only an "intimation of approval" by the Supreme Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) written fifteen years ago when the *old* Wage and Hour Interpretation was in effect.

According to respondent's admission, the court applies the test of whether substantial physical labor

was performed during eating and nighttimes. This is in conflict with the ruling of this Court in *Armour & Co.* v. *Wantock, supra,* which provides that the test shall be "whether time is spent predominantly for the employer's benefit or for the employee's . . ." It is in conflict with *Skidmore* v. *Swift & Co.*, 323 U.S. 134— ". . . we hold that no principle of law found either in the statute or in court decisions precludes waiting time from also being working time." The performance of labor is not the test.

The cases of *Gaetke* v. *United States, supra; Sawyer* v. *United States, supra,* and *Ahearn* v. *United States,* No. 332-55, C.Cls. May 7, 1958, have all been extensively treated in our petition and specifically in Section III, page 18, showing that the decisions of the court below are in conflict. However, it is again pointed out that in the *Gaetke* case the court below found the arrangement between plaintiff and defendant was embodied in a formal contract and that the contract was fulfilled. In the *Sawyer* case, the court predicated its decision on the authority in *Gaetke.* The reasoning and test applied in the *Farley* and *England* cases were not followed.

In *Ahearn* v. *United States, supra,* the court below did allow recovery for actual physical labor performed during the night hours and meal times, and although respondent says that the court below has consistently allowed such recovery, such statement is inaccurate with respect to the case at bar as no recovery was allowed for actual physical labor shown by the written record to have been performed during eating and night hours.

There is thus a clear conflict between the cases cited, all decided by the court below and all having identical

factual situations, except in the case of *Gaetke* wherein there was a formal written contract not present in the other cases.

The decisions in *Collins* v. *United States*, No. 141-56, C.Cls., and *Avary* v. *United States*, No. 266-56 C.Cls., both decided March 5, 1958, were on summary judgment and not decisive of the real issues, although the court below again referred to its test as to whether actual physical labor was performed during the hours for which no compensation was ordered. This test is contrary to the earlier test laid down in the *Farley* and *England* cases and in the decision in *Armour & Co.* v. *Wantock*, *supra*, decided by this Court.

Wright v. *United States*, No. 232-57, C.Cls. January 14, 1959, is a companion case to the case at bar and was decided on the same day for the same reasons. It must, therefore, be considered along with the case at bar as being in conflict with the above-cited cases for the reasons specified by petitioners.

In short, we have a situation wherein this Court laid down the test to be followed in *Armour & Co.* v. *Wantock*, *supra*. That test was subsequently applied to the first two cases decided by the Court of Claims: *Farley* v. *United States*, *supra*, and *England* v. *United States*, *supra*. In all subsequent decisions, it completely ignored the test and reached a conclusion of thinking which excluded eating and nighttime from being compensable and justified it on the basis that no substantial physical labor was performed therein, which is completely contrary to the reasoning of this Court wherein it stated,

> "Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for

> something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired quite as much as service itself and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co.* v. *Wantock, supra,* at page 133.

It is time that this Court assert the validity of its opinion and settle the issue decisively for the guidance of all courts and especially the court below.

IV

RESPONDENT IGNORES THE QUESTIONS AS TO NIGHT DIFFERENTIAL AND PAY FOR ACTUAL LABOR

Respondent's reply has failed to answer the question of night differential pay as covered in Section IV of petitioners' petition.

Respondent's reply has also failed to cover the question of compensation for actual hours of physical labor performed and interruptions during eating and nighttimes, as specifically raised by petitioners.

V

CONCLUSION

Prior petitions for writs of certiorari did not present the conflict that engulfs this question.

The decisions of the Court of Claims and the various appellate courts are in a hopeless state of confusion. The decisions in the Court of Claims cannot be reconciled with each other, nor with the decisions in the Circuit Courts of Appeals. The Court of Claims has failed except in the first two cases decided, to apply the

principle laid down by this Court as the test for determining hours of employment. For these reasons and the fact that the question is one affecting employees of the United States Government and the proper interpretation of the statute determining their employment, the Court should grant this petition and resolve the difficulty these questions present.

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